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**Citation for published version:**

Kennedy, C 2016, 'Ungovernable feelings and passions': Common sense philosophy and mental state defences in nineteenth century Scotland', *Edinburgh Law Review*, vol. 20, no. 3, pp. 285-311.  
<https://doi.org/10.3366/elr.2016.0360>

**Digital Object Identifier (DOI):**

[10.3366/elr.2016.0360](https://doi.org/10.3366/elr.2016.0360)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Edinburgh Law Review

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**Abstract:** During the nineteenth century, changing conceptions of mental disorder had profound implications for the way that criminal responsibility was conceived. As medical writers and practitioners increasingly drew attention to the complexities of insanity, the grounds on which mentally abnormal offenders could be excused began to seem unduly restrictive. By way of a contribution to our understanding of this development, this article examines how the growing disparity unfolded in Scotland. I argue that the requirements of the insanity defence, as set out within judicial directions, reflect core facets of Scottish Common Sense philosophical thought, including Thomas Reid's view of human agency and understanding of 'common sense'. Building on this contention, I suggest that Scottish Common Sense philosophy played an important role in the development of Scottish mental state defences more broadly, and can provide an original interpretation of the way the doctrines of provocation and diminished responsibility changed during this era.

**Keywords:** Common Sense philosophy, Thomas Reid, Dugald Stewart, John Abercrombie, criminal law, Scots law, criminal responsibility, insanity, mental disorder, legal history, provocation, diminished responsibility.

# **‘UNGOVERNABLE FEELINGS AND PASSIONS’: COMMON SENSE PHILOSOPHY AND MENTAL STATE DEFENCES IN NINETEENTH CENTURY SCOTLAND**

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## **A. INTRODUCTION**

During the nineteenth century, the extent to which mentally abnormal offenders ought to be held accountable for their crimes was a pressing concern in both medical and legal circles. As medical writers and practitioners advanced new understandings of mental disorder, the narrow view of insanity employed within the criminal law began to appear unduly restrictive. In this article I explore how the contested boundary between sanity and insanity, and criminal responsibility and non-responsibility, was delineated in the Scottish context, where it has received relatively little attention.<sup>1</sup> I assess how the Scottish judiciary handled emerging notions of insanity,<sup>2</sup> which posed a risk to the way criminal responsibility was understood, and situate these responses in the wider medico-legal debates that occurred within Britain and America throughout much of the century.

Whilst these medico-legal debates are crucial to understanding the law's development, they provide only part of the explanation. As Wiener and others have recognised,<sup>3</sup> disagreements over the proper parameters of criminal responsibility touched

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<sup>1</sup> From a large body of historical scholarship on insanity and criminal responsibility, the main contribution relating to Scotland is R A Houston, *Madness and Society in Eighteenth-Century Scotland* (1999).

<sup>2</sup> In making this assessment, I concentrate on the most significant reported cases in which insanity was pled as a defence. Although the Books of Adjournal contain a number of unreported cases in which insanity was pled, these cases disclose little, if anything, about the arguments made by counsel or the directions given to the jury.

<sup>3</sup> M J Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830-1914* (1990); R Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (1981).

upon fundamental philosophical and theological issues, including beliefs about free will, necessity and the capacities of ‘ordinary’ individuals. These deliberations were particularly salient in the nineteenth century because, apart from being central to questions about criminal responsibility, they featured in broadly contemporaneous philosophical discourse over the relationship between reason and the passions and the limits of self-governance.<sup>4</sup> As I discuss further below, these topics were pertinent to disputes over the existence, and legal significance, of volitional insanity<sup>5</sup> that arose at the start of the nineteenth century. Prevailing philosophical views therefore constitute an important angle from which to consider how the contours of criminal responsibility were drawn during this period. In light of this, I offer a reading of the insanity defence, and the mental state defences of provocation and diminished responsibility,<sup>6</sup> which links their development to key tenets of Common Sense philosophy – a school of thought which enjoyed considerable prominence in nineteenth century Scotland.<sup>7</sup>

From its inception during the eighteenth century until its decline in the closing decades of the nineteenth century, Common Sense philosophy was an orthodox component of a Scottish university education,<sup>8</sup> the idiosyncratic mainstay of which was a solid grounding in metaphysical and moral philosophy.<sup>9</sup> Outside the universities philosophical knowledge was prevalent too, as many of the readers and consumers of philosophical texts were middle

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<sup>4</sup> See J A Harris (ed) *The Oxford Handbook of British Philosophy in the Eighteenth Century* (2013).

<sup>5</sup> Mental disorder afflicting the sufferer’s will and self-control.

<sup>6</sup> Provocation is included on the basis that loss of self-control can be considered akin to a mental state (S Yannoulidis, “Excusing Fleeting Mental States: Provocation, Involuntariness and Normative Practice” (2005) 12 *Psychiatry, Psychology and Law* 23).

<sup>7</sup> Scottish Common Sense philosophy also played an important role in medico-legal debates about responsibility in antebellum America (S L Blumenthal, “The Mind of a Moral Agent: Scottish Common Sense Philosophy and the Problem of Responsibility in Nineteenth-Century American Law” (2008) 26(1) *LHR* 99).

<sup>8</sup> G Graham, “Hamilton, Scottish Common Sense, and the Philosophy of the Conditioned” in W J Mander (ed), *The Oxford Handbook of British Philosophy in the Nineteenth Century* (2014) 135 at 135-137, 148.

<sup>9</sup> G E Davie, *The Democratic Intellect* (1961) 7.

class men in pursuit of a civilized mind and cultivated taste.<sup>10</sup> A proportion of this demographic would have been lawyers and judges, for although a university education was not a formal requirement for admission to the Faculty of Advocates, candidates with a broad, liberal education were increasingly desirable from the middle of the eighteenth century.<sup>11</sup> Indeed, candidates without a university degree were examined on, *inter alia*, metaphysical philosophy, including *The Collected Works Of Thomas Reid*, as edited by Sir William Hamilton.<sup>12</sup>

Within the topography of British philosophy, the Scottish Common Sense school was one of the two metaphysical systems that dominated the first half of the nineteenth century, the other being the English Empirical school.<sup>13</sup> In contrast to the Empirical school, a fundamental principle of the Scottish school was the existence of experience-independent speculative and practical laws.<sup>14</sup> This principle had important repercussions for the school's theories of perception and knowledge, both of which attached considerable significance to common sense.<sup>15</sup> The school is primarily remembered for these theories,<sup>16</sup> but its members also made important contributions to debates about morality and determinism. Thomas Reid, in particular, was noteworthy amongst the libertarians of his age, arguing that human beings, as moral agents, had the 'active power' to govern themselves and overcome their desires and passions.<sup>17</sup> Connected to this, and along with other Common Sense philosophers, Reid subscribed to (and developed) ethical intuitionism – the idea that humans can immediately

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<sup>10</sup> J A Harris, "Introduction", in Harris (ed), *Oxford Handbook* (n 4) 1 at 8.

<sup>11</sup> J W Cairns, "The Formation of the Scottish Legal Mind in the Eighteenth Century: Themes of Humanism and Enlightenment in the Admission of Advocates" in N MacCormick & P Birks (eds) *The Legal Mind: Essays for Tony Honoré* (1986) 253.

<sup>12</sup> "The Education of Scottish Lawyers" (1869) 3 *Journal of Jurisprudence* 124 at 130.

<sup>13</sup> W J Mander, "Introduction", in Mander (ed), *Oxford Handbook* (n 8) 1 at 5.

<sup>14</sup> S A Grave, *The Scottish Philosophy of Common Sense* (1960) 3.

<sup>15</sup> *Ibid* 19-20, ch 4.

<sup>16</sup> Partly because they received much attention from the school's opponents (Graham (n8) at 150).

<sup>17</sup> S Greenberg, "Liberty and Necessity", in Harris (ed), *Oxford Handbook* (n 4) 248 at 263.

apprehend moral truths – which was the main rival to the moral utilitarianism that gained traction in nineteenth century England.<sup>18</sup>

Each of these elements of Common Sense philosophy is reflected in my reading of the development of mental state defences in nineteenth century Scotland, to which there is two strands. The first strand examines the rejection of new understandings of mental disorder which, from the first third of the century, threatened to narrow the scope of criminal responsibility. This effort was led by Lord Hope from the middle of the century and, I suggest, reflects a view of human agency consistent with that of the Scottish Common Sense philosophers John Abercrombie, Thomas Reid and Dugald Stewart. According to this view, individuals were vested with an innate power to perceive moral truths and to act in accordance with them – a power that was intimately bound up with the ability to resist undesirable passions and desires. As I seek to show, a similar perspective on human agency also appears to have informed the way the provocation defence was defined in Scotland at the end of the eighteenth century.

The second strand focuses on how, during the final third of the century, the insanity defence became based on the loose test of ‘soundness of mind’. This change meant the jury was effectively entrusted with determining the substance of the test for assessing the sanity of an accused person, rather than simply the task of applying it. Paying heed to the significance of prevailing philosophical beliefs, I suggest this shift also reflects core features of the Common Sense school of thought. Coupled to the development of diminished responsibility, which allowed the jury to mitigate culpability on the basis of mental unsoundness falling short of insanity, this evolution in the law reflects the confidence in common sense knowledge that was central to Common Sense philosophy.

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<sup>18</sup> Mander (n13) at 11. Leading utilitarians, including Jeremy Bentham and John Stewart Mill, were highly critical of Scottish Common Sense philosophy.

## B. EARLY NINETEENTH CENTURY DEVELOPMENTS

The starting point for understanding the two interpretive strands of this article is to set out some of the early nineteenth century developments within medical and legal understandings of mental disorder and in medico-legal relations. Changes during this time, including the increased involvement of medical men (and others charged with managing the mentally disordered) in the identification and treatment of insanity,<sup>19</sup> set the tone for the consternation that arose between legal and medical professionals later in the century. In addition to appearing more frequently as witnesses in trials,<sup>20</sup> medical writers began to advance nuanced conceptions of insanity, which incorporated what some lawyers referred to as ‘partial insanity’.<sup>21</sup> This concept of partial insanity could refer to insanity that was intermittent, mild, or circumscribed in one of two senses, i.e. relating only to one subject or affecting only one part of the mind.<sup>22</sup>

The latter two forms of partial insanity were especially significant in the early nineteenth century, when medical consensus grew around the existence of delusions –

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<sup>19</sup> A Loughnan & T Ward, “Emergent Authority and Expert Knowledge: Psychiatry and Criminal Responsibility in the UK” 37 (2014) *Int’l J L & Psychiatry* 25 at 27.

<sup>20</sup> J P Eigen & G Andoll, “From Mad-Doctor to Forensic Witness: The Evolution of Early English Court Psychiatry” (1986) 9 *Int’l J L & Psychiatry* 159; T Ward, “Observers, Advisors, or Authorities? Experts, Juries and Criminal Responsibility in Historical Perspective” (2001) 12 (1) *Journal of Forensic Psychiatry* 105; R A Houston, “Courts, doctors, and insanity defences in 18<sup>th</sup> and early 19<sup>th</sup> century Scotland” (2003) 26 *Int’l J L & Psychiatry* 339.

<sup>21</sup> Reflecting on the sources of medico-legal discord at the end of the nineteenth century, Reginald Noott, senior assistant medical officer at Broadmoor Asylum, remarked that ‘the legal opinion was that only certain forms and degrees of insanity should constitute irresponsibility; the medical profession generally not recognising the term “partial insanity”, as understood by lawyers, maintained...that all forms and degrees of insanity should constitute irresponsibility’ (R H Noott, “The Responsibility of the Insane: Should they be punished? A Reply to Dr Mercier” (1899) 45 (188) *Journal of Mental Science* 53 at 54).

<sup>22</sup> G Berrios, “Descriptive Psychiatry and Psychiatric Nosology during the Nineteenth Century”, in E R Wallace & J Gach (eds), *History of Psychiatry and Medical Psychology* (2008) 353 at 365.

madness that seemed confined to one principal idea<sup>23</sup> – and members of the French school of *médecin mentale*, led by the psychiatrists Philippe Pinel, Jean-Étienne Dominique Esquirol and Étienne-Jean Georget, put forward the notion of *manie sans délire* – insanity without any reasoning defect, hallucination or delusion.<sup>24</sup> This form of insanity was innovative, for it raised the possibility of purely emotional or volitional insanity.<sup>25</sup>

The idea of purely emotional or volitional insanity was propounded by British writers too, including James Prichard, a Scottish-born physician, who argued that there could be “a morbid perversion of the feelings, affections and active powers, without any illusion or erroneous conviction impressed upon the understanding”.<sup>26</sup> To describe this affliction Prichard coined the phrase ‘moral insanity’, by which he meant “a disorder which affects the feelings and affections, or what are termed the moral powers of the mind, in contradistinction to the powers of understanding and the intellect”.<sup>27</sup> While some specialists confirmed the existence of this type of insanity,<sup>28</sup> others were more dubious, questioning many cases in which the morals were said to be depraved but the intellect untouched.<sup>29</sup>

These new understandings of insanity differed from the complete lack of reason and understanding that traditionally characterised non-responsibility under English law<sup>30</sup> and,

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<sup>23</sup> J P Eigen, “Delusion in the Courtroom: The Role of Partial Insanity in Early Forensic Testimony” (1991) 35 *Medical History* 25 at 32-33.

<sup>24</sup> *Ibid*, at 34.

<sup>25</sup> Berrios (n 22) at 366.

<sup>26</sup> J C Pritchard, *A Treatise on Insanity and other Disorder Affecting the Mind* (1835) 12.

<sup>27</sup> J C Pritchard, *On the Different forms of Insanity, In relation to Jurisprudence, Designed for the use of Persons Concerned in Legal Questions Regarding Unsoundness of Mind* (1842) 19.

<sup>28</sup> H Maudsley, “Remarks on Crime and Criminals” (1888) 34 *Journal of Mental Science* 146 at 163. In a paper read to the annual meeting of the Association of Medical Officers of Asylums and Hospitals for the Insane, Dr Davey stated that insanity is a disease “not so much of the knowing or intellectual faculties of the mind, as of the active moral feelings i.e. the affections or emotions” ((1858) 5 (27) *Journal of Mental Science* 82 at 87).

<sup>29</sup> H Monro, “On the Nomenclature of the Various forms of Insanity” (1856) 2 (17) *Asylum Journal* 286 at 292.

<sup>30</sup> Eigen (n 23) at 27.



despite favourable reception by jurors, never amounted to established ‘tests’ of insanity.<sup>31</sup> Similarly, they did not sit entirely comfortably with the test of non-responsibility prescribed by Scots law at the time they emerged. According to Hume, the defence required that the accused had suffered an “absolute alienation of reason”, depriving him of the “knowledge of the true position of things about him”.<sup>32</sup> Though based on an intellectual understanding of mental disorder, thereby precluding purely volitional or emotional insanity, the defence was potentially available to those incapable of judging “upon any particular situation or conjecture, of what is right or wrong with regard to it” but who nevertheless retained a “vestige of reason”.<sup>33</sup> The restrictions on this type of plea were demonstrated in *Eugene Whelps*, in which Lord Justice Clerk Hope stated that although it was possible that monomania<sup>34</sup> or mental delusions on a particular subject might proceed to such a degree as to amount to general insanity, unless it were proved that the delusion caused the criminal act and that the accused was unable to distinguish right from wrong there should be no acquittal.

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The earlier case of *Malcolm McLeod*<sup>36</sup> further indicates how far partial insanity was accepted in Scots law. Counsel for the accused relied on Prichard’s *A Treatise on Insanity and other Disorders Affecting the Mind* to argue that insanity could include monomania (whereby the understanding is partially diseased under the influence of an illusion relating to one subject, but the intellectual powers on other subjects are in great measure unimpaired) and moral insanity (where there is no illusion or defect of the intellect but a morbid perversion of the feelings, temper and natural impulses). In directing the jury, Lord Cockburn

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<sup>31</sup> Ibid at 39, 48.

<sup>32</sup> D Hume, *Commentaries on the Law of Scotland Respecting Crimes* vol. I, (1797) 23.

<sup>33</sup> Ibid 24.

<sup>34</sup> ‘Monomania’ was used to refer both to partial insanity of the intellect and independently arising disorders of the emotions and of the will (Eigen (n 23) at 35).

<sup>35</sup> (1842) Brown 378 at 381.

<sup>36</sup> (1838) Swin 2 88.

drew their attention to the relevant legal authorities<sup>37</sup> and concluded that, on the evidence,<sup>38</sup> not only had the insanity defence not been made out, it had been disproved. In the absence of fuller directions it is unclear whether this conclusion was based on his Lordship's rejection of these forms of partial insanity or the failure of defence counsel to prove them on the evidence presented. I would suggest the former is more likely, at least in relation to moral insanity, since by the authorities cited the defence required an absolute alienation of reason in relation to the relevant act and the accused's lack of knowledge that he was doing wrong in committing it.

By the middle of the nineteenth century, then, the suggestions by some medical professionals that insanity might be confined to one topic or afflict only the emotions or volition had entered the courtroom in both England and Scotland. However, with the exception of salient delusions, which formed part of the Scottish defence, in neither jurisdiction did these new forms of insanity amount to established legal tests. At this time the now famous trial of Daniel McNaughten for the murder of Edward Drummond was held, during which defence counsel, Alexander Cockburn QC, relied on expert medical testimony and psychological publications<sup>39</sup> to argue that McNaughten, who suffered paranoid delusions, was "the victim of ungovernable impulse, which wholly takes away from him the character of a reasonable and responsible being".<sup>40</sup> By intertwining these volitional and cognitive

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<sup>37</sup> Hume's *Commentaries* and Alison's *Principles of the Criminal Law of Scotland* (1832).

<sup>38</sup> Including medical evidence that moral insanity could exist with no particular delusion and that partial derangement might impel a person, conscious that he is doing wrong, to commit a crime (at 97).

<sup>39</sup> Including Prichard's *On the Different forms of Insanity* and Isaac Ray's *A Treatise on the Medical Jurisprudence of Insanity* (1838).

<sup>40</sup> B L Diamond, "Isaac Ray and the Trial of Daniel McNaghten" (1956) 112 (8) *American Journal of Psychiatry* 651.

impairments, Cockburn managed to present a case of volitional insanity as one that satisfied the legal test of non-responsibility.<sup>41</sup>

Following McNaughten's acquittal, Her Majesty's judges were summoned before the House of Lords to clarify the law of insanity. Their statement on the matter (which is now referred to as the McNaughten Rules) asserted the cognitive foundations of the defence and effectively insulated the law from the notion of volitional insanity. The Rules stated:

That if the accused was conscious that the act was one which he ought not to do; and if the act was at the same time contrary to law, he is punishable...to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know what he was doing was wrong.<sup>42</sup>

This test of insanity was much criticised, especially by medical commentators, for it relied on an outmoded understanding of mental disorder and ensured that criminal responsibility remained within the competence of legal expertise, thereby rendering medical opinion unnecessary.<sup>43</sup> Though the stringency of the Rules was eventually diluted through a

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<sup>41</sup> K Smith, "General Principles of Criminal Law" in W Cornish et al (eds) *The Oxford History of the Laws of England* (vol XIII) (2010) 217 at 239.

<sup>42</sup> *R v McNaughten* (1843) 8 ER 718 at 719.

<sup>43</sup> There were legal critics of the Rules but medical criticism (which was not unanimous) led to hostility between the two professions. See Smith (n 37) 243-256; "Lord Bramwell on Crime and Insanity" (1886) 32 (137) *Journal of Mental Science* 65; S W North, "Insanity and Crime: Paper read before the York Law Students' Society" (1886) 32 (138) *Journal of Mental Science* 163.

combination of judicial gloss and executive leniency, they remained the formal expression of English law.<sup>44</sup>

### C. LORD HOPE'S REJECTION OF VOLITIONAL INSANITY

The tension between medical and legal views on mental disorder and criminal responsibility, which had been growing throughout the early nineteenth century, escalated further in the second half of the nineteenth century. By this time, it had become more common for medical witnesses to provide courtroom testimony and to lay claim to a body of expert knowledge that uniquely qualified them to diagnose insanity.<sup>45</sup> Additionally, the gulf between medical and legal conceptions of insanity became ever more apparent, as medical professionals gained a conspicuous voice with which to express their discontent over the substance and application of legal tests of non-responsibility.<sup>46</sup> In respect of the law's application, a core complaint was that jurors and judges afforded insufficient weight to medical opinion – a phenomenon that some scholars have interpreted as evidence of a battle for recognition waged by the then-nascent psychiatric profession in the face of sceptical lawyers, judges, journalists and other medical professionals.<sup>47</sup>

Together, these developments appear to have contributed to increased anxiety over maintaining the boundaries of criminal responsibility. In an era marked by heightened concern with upholding political and social order, any attempt to widen the grounds on which

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<sup>44</sup> Smith (n 41) at 243-256; N Walker, *Crime and Insanity in England* (vol 1) (1968) ch 13. Judicial departure from the Rules also occurred in America ("Legal Tests of Criminal Responsibility" (1889) 35 (149) *Journal of Mental Science* 136; "The Recent Judicial Departure in Insanity Cases" (1889) 33 JJur 26).

<sup>45</sup> Ward (n 20) at 108; Loughnan & Ward (n 19) at 28.

<sup>46</sup> Numerous articles illustrating this discontent exist in the *Journal of Mental Science* from the journal's inception in middle of the nineteenth century through to the end of the century.

<sup>47</sup> Smith, *Trial by Medicine* 168 and see Loughnan, *Manifest Madness* 145 for discussion of this interpretation.

criminal conduct might be excused was regarded unfavourably.<sup>48</sup> Part of the hostility towards medical opinion, where it existed, was therefore due to the perceived tendency of physicians to diagnose offenders as insane, and thus non-responsible, too readily. In 1867 Dr David Skae, a specialist in insanity, wrote that medical men had been accused of “making out everybody to be mad, and every foolish, vicious, or criminal act to be a proof of madness”.<sup>49</sup> According to Dr Henry Maudsley, a prominent British psychiatrist of the time, these concerns were “not without excuse”, since doctors who testified in court were known to offer support to any case, no matter how weak, and often without regard to differing medical opinion.<sup>50</sup>

This consternation forms part of the background against which the Scottish judiciary, starting with Lord Hope, rejected the suggestion that volitional disorders should excuse the accused. Though the insanity defence did not appear to incorporate such disorders, during the second half of the century references to irresistible impulses and moral insanity began to appear more frequently in the High Court of Justiciary. It appears likely that the McNaughten trial could have contributed to this development.<sup>51</sup> The case was well-publicised<sup>52</sup> and it seems no coincidence that just one year after its conclusion defence counsel in the trial of *Jas*

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<sup>48</sup> Wiener, *Reconstructing the Criminal* 11, 84.

<sup>49</sup> D Skae, *The Legal Relations of Insanity: The Civil Incapacity and Legal Responsibility of the Insane* (1867) 5.

<sup>50</sup> H Maudsley, “Criminal Responsibility in Relation to Insanity” (1895) 41 (175) *Journal of Mental Science* 657, at 661. Dr Hood, a physician in the Royal Bethlem Hospital, noted that several patients who were acquitted after pleading insanity displayed no symptoms of mental disorder, and speculated that the cause was ““specialist” physicians [who] would lend themselves to the lawyers to whom the defence is entrusted” (W C Hood, “Criminal Lunatics. A Letter to the Chairman of the Commission for Lunacy” (1860) 6 (34) *Journal of Mental Science* 513 at 515).

<sup>51</sup> Cf Walker, who describes the Rules as having been “merely interesting news” in Scotland (Walker, *Crime and Insanity* 144).

<sup>52</sup> For example, in Scotland the Caledonian Mercury published a lengthy account of the trial proceedings (‘Trial of M’Naughten for the Murder of Mr Drummond’ March 6 and March 9 1843) and The Scotsman featured a length article about McNaughten’s acquittal (‘M’Naughten’s Acquittal’ March 22 1843).

*Gibson*<sup>53</sup> cited Ray's work to support his argument that the accused suffered delusions and was therefore not a voluntary agent.

Lord Hope's remarks in the later case of *George Lillie Smith* hint at this possibility. In his charge to the jury, he commented that:

I do not intend to state the law at such length as was done by me in 1844, in the case of *Gibson*...we had then to contend with very mischievous notions set abroad by several writers and medical men on this very subject, and aggravated, I am sorry to say, by inconsiderately humane verdicts in another part of the country.<sup>54</sup>

In response to counsel's arguments, Lord Hope informed the jury that they were not to consider the definition of insanity offered by medical men, especially not the "fantastic and shadowy" definition found in Ray.<sup>55</sup> Quoting from the M'Naughten Rules, his Lordship explained that they expressed the law of Scotland, a fact he considered fortunate because "anything more varying, or inconsistent, or unsatisfactory, than the definitions of insanity given by Ray and many other medical writers cannot be conceived".<sup>56</sup> From this excerpt it is

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<sup>53</sup> (1844) 2 Brown 332.

<sup>54</sup> (1855) 2 Irv 1. Seven months after the M'Naughten trial, Lord Cockburn remarked: "I have little doubt that, at present, when the benevolent towards criminals have succeeded in raising a cry against punishing any culprit who had, or says that he had, a crotchet which led him to commit his offence (which they call by some technical name), there are very few acts of criminal malice that are not helped on by the idea that this defence [insanity] may be successful in the time of need" (H Cockburn, *Circuit Journeys* (1889) 203-204 (entry dated 1 October 1843)).

<sup>55</sup> *Gibson* at 357. Lord Hope seems to mimic the words of Alexander Cockburn, who told the M'Naughten jury they were unable to judge the 'nice and shadowy distinctions' between soundness and unsoundness of mind as well as experts (quotation referred to in Ward (n 20) at 111).

<sup>56</sup> *Gibson* at 358.

clear that doubts as to the reliability of medical opinion drove Lord Hope's efforts to prevent these new forms of insanity infiltrating the law.<sup>57</sup>

Nevertheless, this scepticism only partly explains Lord Hope's attitude. In addition to disdain for medical opinion, Lord Hope's dismissal of these types of insanity reflects the general concern within Victorian Britain to inculcate self-control and foster an ethos of respectability.<sup>58</sup> However, rather than promoting the utilitarian ideal that underpinned some English efforts to instill self-regulation – the “Benthamite calculator...whose attention was habitually focused upon distant consequences”<sup>59</sup> – Lord Hope's dismissal of these types of insanity appears to be based on his adherence to a conception of human agency that is rooted in Common Sense philosophical thought. According to Lord Hope, a man could not escape punishment if he had “allow[ed] a fancy or morbid feeling to get possession of his mind and temper” because, in breaking the law, he had given way to the temptations of “ill-regulated, morbid, distempered, and ungovernable feelings and passions” and had “indulge[d] in their gratification and satisfaction”s.<sup>60</sup>

The same sentiments appear to have underpinned Lord Hope's jury directions in *George Lillie Smith*,<sup>61</sup> where he stated that “the law does not for one moment countenance the notion of moral insanity, which is largely written of and treated by numerous authors – that is to say, what they call irresistible impulses, by which man is driven into crime, while it is not proved that his reason is destroyed”.<sup>62</sup> Again, the reasons given by Lord Hope were that the accused was not “insane and irresponsible morally on account of the length of time he has indulged angry and evil passions, or in respect of the power, strength and mastery

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<sup>57</sup> Lord Hope expressly rejected the idea that the law should follow medical views on insanity or afford medical opinion much weight (at 358).

<sup>58</sup> Wiener, *Reconstructing the Criminal* 11.

<sup>59</sup> Ibid 39.

<sup>60</sup> *Gibson* at 360.

<sup>61</sup> (1855) 2 Irv 1.

<sup>62</sup> Ibid at 53.

which they may have acquired over him”. He added that if, in such a state of mind, a man “chooses to commit crimes” and “gives way to temptations”, which are strong “only because he has long indulged in such thoughts”, the jury were to be assured that “he was not tempted above what he is able to bear” and was therefore rightly to be regarded as punishable.<sup>63</sup>

This account of why volitional insanity would not excuse an offender both assumes a universal power of self-control and regards any misuse of this capacity as culpable. In support of this perspective, Lord Hope cited the Bible<sup>64</sup> and Dr John Abercrombie,<sup>65</sup> a pious Scottish physician turned metaphysicist, who is classed amongst the Common Sense philosophers<sup>66</sup> and whose writings share many features with other, more prominent members of the school. Describing him as “the soundest on these subjects of all medical writers”, Lord Hope spoke approvingly of Abercrombie’s work, in which “the notion that a man...is insane and irresponsible merely on account of the extent to which he has indulged the angry and evil passions which have occupied his mind, or of the power and strength and mastery which they may have acquired over him from long brooding over the subjects of them, is nowhere countenanced”.<sup>67</sup>

A persistent theme of Abercrombie’s writing, which comes out in Lord Hope’s jury directions, is that of moral degradation and its causes. In keeping with the works of Thomas Reid and Dugald Stewart,<sup>68</sup> Abercrombie held that every man possesses an innate ability (derived from what he variously termed the moral conscience or moral principle) to perceive

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<sup>63</sup> Ibid at 60.

<sup>64</sup> *Gibson* at 360 and *Lillie Smith* at 62. Lord Hope’s reliance on Biblical authority tallies with his being a stout defender of the established church (G F Millar, ‘Hope, John (1794–1858)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 <http://www.oxforddnb.com/view/article/13733>).

<sup>65</sup> *Gibson* at 360.

<sup>66</sup> J Fieser (ed), *A Bibliography of Scottish Common Sense Philosophy* (2000).

<sup>67</sup> *Gibson* at 360.

<sup>68</sup> Which Abercrombie followed (N Hervey, ‘Abercrombie, John’ (1726–1806)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 <http://www.oxforddnb.com.ezproxy.is.ed.ac.uk/view/article/37?docPos=2>).



moral truths, including the distinction between right and wrong, and to act in accordance with them.<sup>69</sup> This capacity was intrinsically linked to the ability to control one's passions; since the conscience was thought to have 'supreme authority' over the whole intellectual and moral system, it allowed for effective regulation of the passions, emotions and desires.<sup>70</sup> In accordance with this belief, Reid taught that there were simply no passions so strong as to be regarded irresistible. Although a passion that was difficult to control might alleviate blame, since it would not be *irresistible* it could not exculpate wholly.<sup>71</sup>

The capacity to discern and follow the dictates of one's conscience was mutable, however, and could diminish if disregarded or neglected.<sup>72</sup> It was therefore the duty of every individual to make best use of his moral powers and develop them through habitual use, and failure in this endeavour was considered unquestionably culpable. Reid conceived of this process as a struggle against temptation, believing that overcoming undesirable passions was the primary way in which human virtue could flourish.<sup>73</sup> Indeed, the more difficult the conquest, the more glorious it was thought to be.<sup>74</sup> Echoes of this confidence in man's ability to grapple with and defeat his passions are present in Lord Hope's instruction that to plead the insanity defence successfully "[t]he panel must be shewn [*sic*] to be unable, by the

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<sup>69</sup> J Abercrombie, *The Philosophy of the Moral Feelings* (1833) 15-17, 20-21, 141-142; T Reid, *Essays on the Active Powers of Man* (1788); D Stewart, *The Philosophy of the Active and Moral Powers of Man*, 2<sup>nd</sup> edn (1851). This belief was prominent in Scottish Enlightenment thought more generally. Building on the work of Lord Shaftesbury, Frances Hutcheson was the first to develop and fully defend the theory of 'moral sense' (W Frankena, "Hutcheson's Moral Sense Theory" (1955) 16 (3) *Journal of the History of Ideas* 356 at 358).

<sup>70</sup> J Abercrombie, *Inquiries Concerning the Intellectual Powers and the Investigation of Truth* (1830) 429.

<sup>71</sup> Reid, *Active Powers* 319-320. Reid expressed these views in the context of the criminal law in a letter to the eighteenth century judge and philosopher Lord Kames, dating from 1772 (P Wood (ed) *The Correspondence of Thomas Reid* (2002) 69-70).

<sup>72</sup> Abercrombie, *Moral Feelings* 11-12, 118-124. Reid and Stewart also recognised this possibility (Reid, *Active Powers* 269; Stewart, *Active and Moral Powers* 314).

<sup>73</sup> Reid, *Active Powers* 186-187.

<sup>74</sup> Ibid. 262; Stewart, *Active and Moral Powers* 314.

visitation of God, to do what his duty to God requires – to struggle and overcome his passions, which every man possessed of reason may”.<sup>75</sup>

The consequences of failing to attend to, and habitually obey, one’s moral conscience could be dire, as portended by Abercrombie: “if the desires are allowed to break free from the restraints of reason and the moral principle, the man is left at the mercy of unhallowed passion, and is liable to those irregularities which naturally result from such a derangement of the moral feelings”.<sup>76</sup> Importantly, Abercrombie did not regard this derangement as a form of insanity. He acknowledged the existence of what, “in the language of common life, we sometimes speak of as moral insanity”, in which one’s reason remains unimpaired but “every correct feeling appears obliterated” and the moral powers lose their sway.<sup>77</sup> Yet he was clear that this condition was merely *analogous* to and not constitutive of insanity. In distinguishing between the provinces of reason and conscience, Abercrombie wrote that derangement of a man’s sense and approbation of moral relations is “in reference to the moral feeling, what insanity is in regard to the intellectual”.<sup>78</sup>

Abercrombie’s denunciation of moral insanity as a form of mental disorder, is, I suggest, key to understanding Lord Hope’s endeavours to contain the new and unfamiliar forms insanity which threatened to undermine the law’s conception of criminal responsibility. These forms of insanity were not undesirable simply because they were inconsistently defined and thought to be unproven; nor was their rejection attributable solely to a professional ‘turf war’ between lawyers and medics. The idea of moral or volitional insanity was problematic to Lord Hope because it offended against the vision of human agency by which he abided. As I have sought to demonstrate, this conception of human agency was consistent with that of the Common Sense philosophers John Abercrombie, whom Lord Hope

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<sup>75</sup> George Lillie Smith at 62.

<sup>76</sup> Abercrombie, *Moral Feelings* 46.

<sup>77</sup> Abercrombie, *Intellectual Powers* 348-349.

<sup>78</sup> Abercrombie, *Moral Feelings* 147-148.

expressly followed, and Thomas Reid and Dugald Stewart, whose work Abercrombie closely replicated.

#### D. PROVOCATION

Traces of the Common Sense view of human agency, which appears to have underpinned Lord Hope's rejection of volitional insanity, can also be discerned in the leading account of provocation given by Hume. As these traces imply, this perspective might therefore enable us to better understand the way the defence developed at the end of the eighteenth century and the limitations that were placed upon its availability. Prior to this time, there was some recognition that killing in the heat of the moment or in response to provocation was not as culpable as pre-meditated homicide. This recognition found form in the ancient distinction between intentional killing and killing *chaude melle*<sup>79</sup> and the rule that revenge killings were unjustifiable.<sup>80</sup> However, the explanation of provocation given by Hume shows that by the end of the eighteenth century the defence had developed more fully and specifically concerned the accused's mental state.

As Jeremy Horder has identified, this move towards greater recognition of mental state within the provocation defence is also evident within English law. During the eighteenth century, the defence, which had previously depended on the proportionality of the defendant's reaction, came to depend on an assessment of whether he had lost self-control.<sup>81</sup> Horder attributes this change to the emergence of a qualitative distinction between reason and

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<sup>79</sup> *Chaud melle* or *rixa* was an ancient term that referred to homicide committed 'on a sudden, and in heat of blood' (W Bell, *A Dictionary and Digest of the Law of Scotland, with Short Explanations of the Most Ordinary English Law Terms* (1839) 160).

<sup>80</sup> George Mackenzie, *Laws and Customes of Scotland in Matters Criminal: wherein it is to be shown how the civil law, and the laws and customs of other nations do agree with, and supply ours*, 1678, repr. (2005) Title XI.

<sup>81</sup> J Horder, *Provocation and Responsibility* (1992) ch 5.

the passions, after which the test for provocation became whether the controlling power of reason had been eclipsed by the passions.<sup>82</sup> Due to uncertainty over the mitigatory effect of provocation prior to the publication of Hume's *Commentaries*,<sup>83</sup> it is difficult to undertake a similar assessment of Scots law. However, it is apparent that the relationship between reason and the passions is fundamental to the way Hume conceived of the defence, and the nature of this relationship suggests an affinity with Reid's view of human agency. These conceptual parallels are likely attributable to Hume's having been a student at the University of Glasgow during the years Reid was professor of moral philosophy.<sup>84</sup> Since it was common at this time for law students to attend lectures given by philosophers at their institutions, it is likely that Hume would have been familiar with Reid's theories on the intellectual and active powers.<sup>85</sup>

Hume differentiates between provoked and unprovoked homicide, describing the former as actuated by "the sudden impulse of resentment, excited by the provocation of high and real injuries, and accompanied with terror and agitation of the spirits".<sup>86</sup> The phrases "impulse of resentment" and "agitation of the spirits" suggest the defence was expected to accommodate the kind of immediate and passionate response that Horder attributes to the shift in English law.<sup>87</sup> The first of these terms, when expounded in full, also betrays numerous similarities with Reid's conception of human agency. Hume writes:

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<sup>82</sup> Ibid 73.

<sup>83</sup> L Farmer, *Criminal Law, Tradition and Legal Order: crime and the genius of Scots law 1747 to the present* (1997) 130-131, 153.

<sup>84</sup> J W Cairns, 'Hume, David (bap. 1757, d. 1838)', *Oxford Dictionary of National Biography* (2004) online edition, May 2007 at: <http://www.oxforddnb.com/view/article/14142/>; D M Walker, *The Scottish Jurists* (1985) 282-291.

<sup>85</sup> Reid covered these subjects in his lectures (P Wood, 'Reid, Thomas (1710–1796)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edition, Oct 2006 <http://www.oxforddnb.com/view/article/23342>).

<sup>86</sup> Hume, *Commentaries* 361.

<sup>87</sup> Horder, *Provocation* 74-77.

For although, along with other animals, we are subject to the impulse of resentment on injuries, which is necessary to our preservation; yet it is not in our species, as in theirs, a blind and ungovernable impulse, which transports us whithersoever it will; but has been placed by the Author of our nature, under the controul [*sic*] of a superior principle, which may serve to restrain it within those just bounds, where it answers its proper ends; and by means of which, if duly and habitually exerted, not only the conduct of the man on any particular occasion may be regulated, but even the feeling itself be in a great measure chastened and subdued...To gain this state of self-command, is part of every man's duty...<sup>88</sup>

This description accords with Reid's discussion of the "malevolent affection" resentment, of which, he writes, there are two types. Sudden resentment, which is a blind impulse raised by hurt of any kind, is a response common to humans and "brute-animals" whereas deliberate resentment, which is raised by injury, is a rational principle and can therefore only be experienced by man, who possesses rational faculties.<sup>89</sup> Despite this difference, Reid explains that these two forms of resentment are often intermixed and induce similar effects: an "uneasy sensation, which disturbs the peace of mind" and the impetus to seek redress.<sup>90</sup>

In his account of provocation, it appears Hume is referring to a composite of the two kinds of resentment outlined by Reid, specifying that although we share the impulse of resentment with other animals, we can restrain it through use of a "superior principle". This reference to a superior principle is another similarity between Hume and Reid's writings. As Reid makes clear, deliberate resentment requires an opinion of the injury done or intended, so

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<sup>88</sup> Hume, *Commentaries* 361.

<sup>89</sup> Reid, *Active Powers* 172-173.

<sup>90</sup> Ibid 177-178.

implies an appreciation of justice and therefore possession of a moral faculty.<sup>91</sup> He adds that this moral faculty is part of man's "leading principle", reason, which presides over the passions, including the feeling of resentment when it is sufficiently inflamed.<sup>92</sup> Reid's conception of the relationship between resentment, passions, and reason, which includes the moral faculty, closely resembles Hume's description of provocation. It is for the "superior principle", reason, to keep the feeling of resentment, a passion, within "just and salutary bounds", an assessment that requires a sense of justice and, as such, a moral faculty.

As shown in the previous section, the duty to make best use of one's God-given powers was a feature of Reid's philosophy and it was through exercise and habit that this duty could be fulfilled.<sup>93</sup> Similarly, according to Hume, proper and habitual use of the "superior principle" was the means by which resentment might be contained within its proper bounds and each man might gain self-command. In the context of the criminal law, failure to meet this duty of self-command was constituted by engaging in mortal retaliation without adequately serious cause. Only when the provocation endured was very grave, often to the endangerment of life, would the accused be excused for "the loss of his presence of mind, and excess of the just measure of retaliation".<sup>94</sup> By Hume's account, this sort of behaviour ought to be punished to put men "on their guard" and to "serve as a corrective of sudden passion".<sup>95</sup> Though the defence was thought necessary to allow for the limited "degree of perfection to which our constitution permits us to aspire", it was deemed essential to keep it "within as narrow bounds as we safely can" because "by means of such discipline we may improve and be corrected".<sup>96</sup>

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid 183, 212-215, 219, 233.

<sup>93</sup> Reid, *Active Powers* 255.

<sup>94</sup> Hume, *Commentaries* 382.

<sup>95</sup> Ibid 363.

<sup>96</sup> Ibid.

As with English law, the accused would have no excuse if he appeared to be “master of his emotions”, yet under Scots law the boundaries of the defence were more narrowly drawn.<sup>97</sup> Whereas “*any* assault” could extenuate culpability in England, in Scotland punishment would be mitigated only if the person had been “assaulted and injured”.<sup>98</sup> According to Hume, the defence was limited in recognition of man’s universal capacity to control his passions and for the purpose of strengthening this divine gift. The law therefore echoed the philosophical premises that every person had a duty to master his passions and emotions, and that this duty was one that all were capable of fulfilling. Furthermore, it valorised the struggle to fulfil this duty by encouraging offenders and innocent observers to strengthen their powers of self-control by engaging in their proper use and habitual practise. In both of these respects, the law expressed doctrines that were central to the Scottish Common Sense school of thought, and in particular to the philosophy of Reid, with which Hume would very likely have been familiar.

## **E. COMMON SENSE AND SOUNDNESS OF MIND**

The previous sections sought to demonstrate that Lord Hope’s rejection of volitional insanity and Hume’s development of the provocation defence both reflect the conception of human agency set out by key Common Sense philosophers. This is the first strand of the broader claim of this article: that the Common Sense school of thought played an important role in shaping mental state defences in nineteenth century Scotland. The second strand is based upon a tendency, beginning in the second half of the century, to allow the jury considerable discretion in negating or reducing criminal responsibility on the basis of mental state. Within the insanity defence, this tendency is evident in the “soundness of mind” test, laid down by

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<sup>97</sup> Ibid 389.

<sup>98</sup> Ibid 379.

Lord Moncreiff in the 1870s, which encouraged the jury to use their common sense and knowledge of everyday life to assess the accused's sanity. Outside the insanity defence, this tendency is apparent in the way diminished responsibility developed, under the direction of Lord Deas, from a plea based purely on punishment, to be considered by the executive, to a plea that affected criminal responsibility, to be considered by the jury.

By affording the jury extensive discretion in judging the accused's sanity and culpability, Lords Moncreiff and Deas showed significant regard for lay opinion. Of course, the belief that insanity was a matter of common sense existed in Scots law prior to Lord Moncreiff's reworking of the insanity defence and was commonly held outside Scotland too.<sup>99</sup> What is remarkable about the developments in Scotland towards the end of the century, however, is the *degree* of trust that was placed in lay opinion and the fact that these changes occurred at a time when, in keeping with the rise of scientific naturalism, mental disorder was increasingly being understood in scientific and physiological terms.<sup>100</sup> This development seems to signify an important stage in the process by which expert medical knowledge of insanity, which had been accumulating since the early nineteenth century, broke away from the body of common knowledge out of which it grew.<sup>101</sup> In accordance with this shift, the

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<sup>99</sup> Juries were often directed that the accused's sanity was a question of fact for them to determine (e.g. *Gibson* at 357-358 (in which the jury were called upon to use their own common sense, knowledge of mankind, and estimate of truth); *George Lillie Smith* at 57, 61 (in which the jury's common sense was praised as a means of assessing the accused's state of mind); *John McFadyen* (1860) 3 Irv 650 at 644-655; *Alexander Milne* (1863) 4 Irv 301 at 343-344; *Geo Bryce* (1864) 4 Irv 506 at 525). On this issue generally see Smith (n 3) 77, 142.

<sup>100</sup> Scientific naturalism peaked in Britain during the 1860s and 1870s (Smith (n 3) 9, 15). At this time, detached observation of the physiological dimensions of insanity started to become the preferred means of investigating the causes and effects of mental disorder (M A B, "The Problem of Mind, propounded to Metaphysics and Science" (1863) 8 (42) *Journal of Mental Science* 176; J S Bushnan, "On the Principles and Method of a Practical Science of Mind, in reply to Dr Thomas Laycock, Professor of Medicine in the University of Edinburgh" (1863) 8 (42) *Journal of Mental Science* 235).

<sup>101</sup> Loughnan & Ward (n19) 28; Loughnan, *Manifest Madness* 151.



experts concerned asserted their ability to identify insanity through examination of the patient's history and circumstances<sup>102</sup> and continued to provide evidence in criminal trials.<sup>103</sup>

As Arlie Loughnan has argued more generally, the rise of expert knowledge never fully displaced lay knowledge in the criminal justice practices of responsibility attribution. Jurors and legal actors, including lawyers and judges, continued to rely on lay knowledge in the course of their pleadings and determinations. Even expert knowledge remained, according to Loughnan, qualitatively indistinct from lay knowledge. The expertise claimed by medical men was based on their vast exposure to insanity, rather than some alternative body of knowledge that was inaccessible to ordinary people.<sup>104</sup> Yet the significance accorded to lay knowledge by Lords Moncreiff and Deas towards the end of the nineteenth century remains extraordinary, even when set against these observations. Jurors in Scotland were not only charged with undertaking an evaluation of the accused's sanity; they were instructed to make this assessment on the basis of lay knowledge of the kind acquired by lay persons in the course of their everyday lives.

This high esteem for lay knowledge coheres with the prominence of 'common sense' within Scottish Common Sense philosophy, particularly the works of Reid. Some critics of the Common Sense school misinterpreted, or misrepresented, this aspect of their philosophy as lending support to the vulgar whenever they ran up against the learned.<sup>105</sup> Giving preference to lay opinion, particularly in the face of mounting support for scientific explanations of insanity, can certainly be interpreted as an embodiment of this misconception. However, as with many of their contemporaries, Lords Deas and Moncreiff

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<sup>102</sup> C Scott, "Insanity in its Relation to the Criminal Law: Part II" (1889) 1 *Juridical Review* 333 at 339-341, 380-384; T Laycock, "On the Legal Doctrines of the Responsibility of the Insane and its Consequences" (1864) 10 (51) *Journal of Mental Science* 350 at 365; D Hack Tuke, "Moral or Emotional Insanity" (1884) 31 (134) *Journal of Mental Science* 174 at 190.

<sup>103</sup> Loughnan, *Manifest Madness* 145.

<sup>104</sup> *Ibid* 151-159.

<sup>105</sup> Grave, *Common Sense* 5-6, 114, 123.

would likely have been acquainted with Common Sense philosophy through their education<sup>106</sup> and interactions within the Faculty of Advocates.<sup>107</sup> Their Lordships are particularly likely to have been familiar with Common Sense philosophical works, for both excelled in the study of moral philosophy. Both won prizes in classes led by Professor John Wilson, from whom Lord Deas earned the further praise that his writing was ‘the perfection of clear, vulgar common sense’.<sup>108</sup> In addition to excelling in classes in which Reid and Stewart’s work was very probably discussed,<sup>109</sup> Lords Deas and Moncreiff both borrowed works of Common Sense philosophy from the Advocates Library.<sup>110</sup>

If, as these factors indicate, their Lordships were versed in the oeuvre of Common Sense philosophers, an explanation of their confidence in lay evaluation based on a more nuanced understanding of these works seems plausible. Reid used the phrase ‘common sense’ to signify a basic level of rationality or, as he put it, the “inward light or sense” that enables us to manage our own affairs and makes us answerable for our conduct towards others.<sup>111</sup> Significantly, he characterised this rationality as “easily discerned by its effects in mens [*sic*]

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<sup>106</sup> See section A.

<sup>107</sup> During the eighteenth and early nineteenth centuries, Parliament House was the main site of political and literary activity in Scotland (J C Watt, *John Inglis, Lord Justice-General of Scotland: A Memoir* (1898) 9).

<sup>108</sup> G F Millar, ‘Moncreiff, James Wellwood, first Baron Moncreiff of Tulliebole (1811–1895)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edition, Oct 2009 [<http://www.oxforddnb.com/view/article/18947>]; G F Millar, ‘Deas, Sir George (1804–1887)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [<http://www.oxforddnb.com/view/article/7397>].

<sup>109</sup> Wilson advised his students to read Stewart and Reid’s *Active Powers* and he covered a number of the principles of Common Sense philosophy in his lectures (*Wilson’s Moral Philosophy M.S. Lectures I – delivered at Edinburgh University during session 1843-44* (Gen. 631)).

<sup>110</sup> Lord Moncreiff borrowed *The Collected Works of Thomas Reid* on 17 May 1866 (Faculty Records, FR.276 1030); Lord Deas borrowed Reid’s *Essays on the Intellectual Powers of Man* on August 24 1857, Stewart’s *Philosophy of the Human Mind* on December 1 1857 and Abercrombie’s *Inquiries Concerning the Intellectual Powers of Man and the Investigation of Truth* on April 7 1849 (Faculty Records, FR.273 434, FR.269 373).

<sup>111</sup> T Reid, *Essays on the Intellectual Powers of Man*, Edinburgh (1785) 522. Stewart followed this definition, warning against attributing ‘common sense’ its ordinary meaning (Grave (n 88) 113; D Stewart, *Elements of the Philosophy of the Human Mind* (1822) 50).

actions, in their speeches, and even in their looks”. He added that “when it is made a question, whether a man has this natural gift or not, a judge or a jury, upon a short conversation with him, can, for the most part, determine the question with great assurance”.<sup>112</sup> In other words, Reid conceived of common sense as the measure of sanity and held that it could easily be recognised by ordinary people.

This second point ties in to a more general epistemological feature of Reid’s conception of ‘common sense’. He considered the ordinary person capable of assessing all matters within the realm of common understanding, stating that “[i]n a matter of common sense, every man is no less a competent judge than a Mathematician is in a mathematical demonstration”.<sup>113</sup> This competence did not extend to “matters beyond the reach of common understanding”, however, in which “the many are led by the few, and willingly yield to their authority”.<sup>114</sup> The effect of this use of the phrase ‘common sense’ is to designate an area of knowledge in which lay and expert opinion are of equal value. Reid’s first use of ‘common sense’, to mean rationality, brought the issue of sanity into the realm of common understanding and thus demarcated it a topic on which the ordinary man was equipped to exercise his judgment. In the same way, Lords Deas and Moncreiff classified rationality as a matter falling within the realm of common understanding and therefore properly amenable to lay assessment.

### **(1) Lord Moncreiff and the insanity defence**

At the time Lord Moncreiff reworked the insanity defence, the test of non-responsibility, as set out in the judicial directions succeeding Lord Hope’s, was relatively stable. At least, these

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<sup>112</sup> Reid, *Intellectual Powers* 522.

<sup>113</sup> Ibid 572.

<sup>114</sup> Ibid 566.

directions were consistent to the extent that they adhered to a cognitive conception of insanity and were wary of the existence and implications of volitional insanity. For example, Lord Justice General Colonsay rejected the idea that alleged irresistible impulses might excuse the accused, stating:

I can by no means endorse the doctrine that seems to be held, that when a man cannot control his disposition to do an act he is not responsible for it. Nothing is more common than a person being unable to control his passions...merely because you call it a paroxysm of monomania, that is not a reason for holding that such persons are to be held out of the pale of the law in regard to answering for the consequences of the crime they commit.<sup>115</sup>

Though these remarks acknowledge that passions may be difficult to control, they are plainly not intended to imply that they are uncontrollable. It is the person who is unable to exercise control rather than the passions that are uncontrollable, which explains why the accused remains accountable.

Similarly, Lord Inglis held that such purported forms of insanity could not successfully be relied upon in the courtroom. In *Alexander Milne*,<sup>116</sup> when counsel asked a medical witness if a patient with monomania might be aware of the nature of his crime and yet feel irresistibly impelled to commit it, Lord Inglis replied: “[i]f all the physicians in Europe were to state that, I would tell the jury that they must not believe it, or act on it”.<sup>117</sup> He followed this approach in *Andrew Brown*,<sup>118</sup> stating that nothing but mental disease overpowering one’s reason constituted insanity in the eyes of the law and added that a person

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<sup>115</sup> *Bryce* at 526.

<sup>116</sup> (1863) 4 Irv 301.

<sup>117</sup> *Ibid* at 334.

<sup>118</sup> (1866) 5 Irv 215.

who was weak or had a violent or passionate temper after indulging bad habits, or who was deeply depraved due to faults in his education or person, could not rely on the defence.<sup>119</sup>

Even Lords Cockburn and Cowan, who relaxed the insanity defence enough to recognise a volitional element, did so cautiously and without abandoning the need for cognitive impairment. In *James Denny Scott*<sup>120</sup> Lord Cockburn explained that the defence required absolute insanity at the moment and in relation to the criminal act, adding that it might apply when the accused was under “*an impulse, so irresistible to him, that he was not a free agent*”.<sup>121</sup> This endorsement of volitional insanity was quickly qualified with the proviso that it should be recognised with “great jealousy”, for it was difficult to distinguish true incapacity of resistance from false.<sup>122</sup> Similarly, though Lord Cowan extended the defence to cases where the accused was deprived, through mental disease, of the ability to “controul [*sic*] his actions and desires”, this lack of control was conceived in terms of insufficient rational power.<sup>123</sup>

In the main, therefore, prior to Lord Moncreiff’s reformulation of the insanity defence juries were informed that the test of insanity was essentially cognitive, with the tentative addition of a restricted form of volitional insanity. These directions reflected concerns that “wilful and atrocious actions of wickedness should be metamorphosed into spasms of disease” and the foundations of morality and responsibility thereby undermined.<sup>124</sup> This concern, which was partly founded on the difficulty of distinguishing disease from depravity, was exacerbated by the perceived inability of medical men to assist in this task.<sup>125</sup> However,

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<sup>119</sup> Ibid at 217.

<sup>120</sup> (1853) 1 Irv 132.

<sup>121</sup> Ibid at 141-142 (emphasis in original).

<sup>122</sup> Ibid at 143.

<sup>123</sup> *McFadyen* at 665.

<sup>124</sup> C Scott, “Insanity in its Relation to the Criminal Law” (1889) 1 *Juridical Review* 237 at 254.

<sup>125</sup> Scott (n 102) at 338; “The Plea of Insanity in Criminal Cases” (1876) 20 *Journal of Jurisprudence* 329 at 337-339.

as noted above, by the last third of the century the rise of mental science and the consolidation of expert medical evidence meant that these fears, though still prevalent, had lost some of their potency.<sup>126</sup>

Lord Moncreiff's directions to the jury should be understood in the context of this shift, for one of his reasons for departing from his predecessors' directions was that the test they had sometimes cited – “knowledge of right and wrong” (which he labelled an ‘unscientific maxim’) – had resulted in ‘much unreasoning inhumanity’.<sup>127</sup> As his Lordship pointed out, a man could form and understand the idea of right and wrong and yet be hopelessly insane.<sup>128</sup> By purposefully distancing himself from older tests of insanity and stating that a lack of control arising from a “morbid state of mind” was clearly distinguishable from one arising from “evil inclinations”, “passions” or “feeble self-control”,<sup>129</sup> Lord Moncreiff seemed to align himself with more modern, scientific views of mental disorder.

Certainly, his rejection of earlier tests of insanity was lauded by Dr David Yellowlees, physician superintendent at Glasgow Royal Asylum, who saw this as a “wonderful advance”,<sup>130</sup> and his widening of the defence to accommodate cases which would likely have been excluded earlier in the century<sup>131</sup> was progressive. Even his decision to avoid defining insanity altogether<sup>132</sup> corresponded with some medical views of mental disorder, according to

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<sup>126</sup> Wiener, *Reconstructing the Criminal* 167, 170, 270.

<sup>127</sup> *James Macklin* (1876) 3 Coup 258 at 260.

<sup>128</sup> *Archibald Miller* (1874) 3 Coup 16 at 17-18. See also *Thomas Barr* (1876) 3 Coup 261 at 264 and *Macklin* at 260.

<sup>129</sup> *Elizabeth Sinclair* (1871) 2 Coup 73 at 93.

<sup>130</sup> D Yellowlees, “The Plea of Insanity in Cases of Murder – Cases of Macklin and Barr” (1876) 22 (98) *Journal of Mental Science* 226 at 229.

<sup>131</sup> Such as *Elizabeth Sinclair*, where the jury were allowed to acquit on the basis of paroxysmal mania – insanity consisting of uncontrollable impulses with no delusions or affliction of the intellect.

<sup>132</sup> *Sinclair* at 91; *Miller* at 18; *Macklin* at 259.

which insanity was of no definite entity<sup>133</sup> and comprised many diseases.<sup>134</sup> Yet Lord Moncreiff consistently maintained that insanity was “fortunately...not a matter in which either the opinion of doctors or the definitions of lawyers can be held conclusive”.<sup>135</sup> The only directions he gave were that the jury were to determine whether the accused was of “sound mind”<sup>136</sup> using “the ordinary rules which apply in daily life”<sup>137</sup> and “common practical sense”.<sup>138</sup>

Given the shift towards understanding mental disorder scientifically and Lord Moncreiff’s relatively advanced views, this marginalization of medical opinion appears somewhat problematic. Lord Moncreiff was less hostile towards medical witnesses than some of his predecessors,<sup>139</sup> but he nevertheless undermined their evidence, informing the jury that it “may be useful but on the main grounds on which it [the question of soundness of mind] must be solved you are as good judges of the sanity of any man as exhibited in daily life, as any lawyer or doctor can be. Indeed much better”.<sup>140</sup> In Lord Moncreiff’s view, if an individual could conduct himself with propriety in the course of ordinary life and was not excluded from the confidence of his fellows there was no reason to doubt his sanity. Indeed, his Lordship thought this assessment advanced the jury nine-tenths of the way towards determining the accused’s sanity, with only “exceptional instances” of intermittent insanity or insanity confined to specific subjects posing any diagnostic challenge.<sup>141</sup>

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<sup>133</sup> J C Bucknill, “The Diagnosis of Insanity” (1856) 2 (6) *Asylum Journal* 229 at 229-230.

<sup>134</sup> “The Plea of Insanity in Criminal Cases” at 382.

<sup>135</sup> *Sinclair* at 90; *Miller* at 17; *Macklin* at 260.

<sup>136</sup> *Sinclair* at 90; *Miller* at 17; *Macklin* at 259.

<sup>137</sup> *Macklin* at 260. The same test was prescribed in *Barr* at 263.

<sup>138</sup> *Miller* at 17.

<sup>139</sup> This coheres with developments in England, where by the 1880s and 1890s judicial pronouncements exhibited less anxiety over medical opinion (T Ward, “Law, Common Sense and the Authority of Science: Expert Witnesses and Criminal Insanity in England, Ca. 1840-1940” (1997) 6 *Social and Legal Studies* 343 at 346).

<sup>140</sup> *Macklin* at 260. See also *Sinclair* at 92.

<sup>141</sup> *Macklin* at 261.

This purely quotidian test of insanity was condemned by Dr Yellowlees, who wrote that while it could perhaps be used to infer insanity, the converse was not true.<sup>142</sup> My suggestion is that this test reflects the meaning of ‘common sense’ advanced by Reid, with whose work Lord Moncreiff was likely to have been familiar. In much the same way as Reid, Lord Moncreiff considered sanity a matter falling within the realm of common understanding and thus a matter in which lay assessment was reliable. Similarly, like Reid, he considered the measure of sanity to be one’s ability to manage the everyday tasks of life and maintain the confidence of one’s peers. Lord Moncreiff’s faith in the common sense of the jury is, I would argue, only fully comprehensible in light of these associations, for without them his rebuff of both medical and legal understandings of mental disorder seems to jar with his apparent regard for medical knowledge and his commitment to progressing the law.

## **(2) The development of diminished responsibility**

Apart from Lord Moncreiff’s directions on the insanity defence, the tendency in Scots law to allow jurors wide discretion in assessing sanity and criminal responsibility is evident in the development of the doctrine of diminished responsibility. At the start of the nineteenth century, the flexible and informal nature of sentencing practices meant that Scottish courts could take mental weakness into account when determining the sentence of the accused or whether to recommend mercy.<sup>143</sup> Indeed this practice can be traced back further,<sup>144</sup> but it was during the nineteenth century that the plea developed into a doctrine which could alter the category of crime of which the accused was convicted.

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<sup>142</sup> Yellowlees (n 130) at 230.

<sup>143</sup> G H Gordon, *The Criminal Law of Scotland*, M G A Christie (ed) (2000-2001) para 11.03.

<sup>144</sup> Mackenzie and Hume both recognised that partial responsibility could moderate punishment (Mackenzie, *Matters Criminal* 16; Hume, *Commentaries* 36).



The case which heralded this change was *HM Advocate v Dingwall*<sup>145</sup> in which the accused, who was reliant on alcohol, suffered from *delirium tremens* and had apparently been rendered weak-minded by severe sunstroke, pled insanity. Even though Dingwall's condition did not constitute legal insanity, Lord Deas charged the jury that he "could not say that it was beyond the province of the jury to find a verdict of culpable homicide if they thought that was the nature of the offence" and that the accused's weakness of mind was an element they could take into account in making this decision.<sup>146</sup> This decision was re-enforced in *HM Advocate v McLean*,<sup>147</sup> when Lord Deas stated that it was right and legally sound for weakness of intellect or mental infirmity to modify both the crime of which the accused was convicted and the punishment he would receive.<sup>148</sup> In the following years, and up until the twentieth century, Lord Deas' views gained ready acceptance.<sup>149</sup>

According to Gerald Gordon, this expansion was not a conscious decision to strengthen the connection between mental state and responsibility but a consequence of the mandatory penalty for murder. Since the only way to reduce a mandatory capital sentence was to amend the nature of the conviction,<sup>150</sup> the plea evolved to enable this practice and was rationalised to create the impression that it affected responsibility as well as punishment.<sup>151</sup> Irrespective of whether the development was simply a pragmatic way of circumventing the death penalty, its consequence was that a fuller range of mental impairments was recognised as having a bearing on criminal responsibility.

As with Lord Moncreiff's reworking of the insanity defence, this change should be read in light of the requirements of the insanity defence at the time. Although Lords

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<sup>145</sup> (1867) 5 Irv 466.

<sup>146</sup> Ibid at 479.

<sup>147</sup> (1876) 3 Coup 334.

<sup>148</sup> Ibid at 337-338.

<sup>149</sup> Gordon, *Criminal Law* para 11.14.

<sup>150</sup> Other than by commuted sentence.

<sup>151</sup> Gordon, *Criminal Law* para 11.03.

Cockburn and Cowan had made inroads into accepting volitional insanity, at the time *Dingwall* was decided the test for insanity was essentially cognitive and absolute. In explaining the plea to the jury, Lord Deas explained that Dingwall's case did not involve total deprivation of reason or delusions and that, in light of this, the best guidance he could offer was that if they found Dingwall to have committed the killing with "sufficient mental capacity to know, and did know, that the act was contrary to the law, and punishable by the law, it would be their duty to convict him".<sup>152</sup> The decision to allow mental weakness to affect criminal responsibility thus marked a novel legal acknowledgement of the many shades and varieties of mental disorder that medics had long-recognised. With the emergence of culpable homicide as a positive category of offence<sup>153</sup> and the already permeable boundary between factors relating to defences (and therefore conviction) and mitigating factors relating to sentencing,<sup>154</sup> the expansion of diminished responsibility was remarkably simple.<sup>155</sup>

It is significant that Lord Deas located the power to assess whether mental state should be taken into account in "the province of the jury". The decision was not to be made by medical professionals, nor circumscribed by the judiciary or executive. In this sense, the development of diminished responsibility corresponds with the changes in the insanity defence which began, under Lord Moncreiff, to open up and was placed more completely in the hands of the jury. These developments, which reduced the discrepancy between medical understandings of mental disorder and legal notions of non-responsibility, while continuing to sideline medical opinion in favour of lay evaluation, can be understood as reflections of

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<sup>152</sup> *Dingwall* at 476.

<sup>153</sup> Farmer, *Tradition and Legal Order* 147.

<sup>154</sup> Loughnan, *Manifest Madness* 227.

<sup>155</sup> The transition was unnoticed by some. An article from 1890 states that it was unfortunate that Scots law did not recognise degrees of criminal responsibility or responsibility with a diminished amount of imputability (E F Willoughby, "The Criminal Responsibility of the Insane" (1890) 2 *Juridical Review* 220 at 233).

the Scottish philosophical culture of the nineteenth century in which ‘common sense’ was prized.

## **F. CONCLUSION**

When the pleas of insanity, diminished responsibility and provocation are viewed together, the significance of Common Sense philosophy in the development of mental state defences in nineteenth century Scotland emerges most clearly. Though these defences seem disparate, with little but their association with the accused’s mental state to connect them, each appears to bear the imprint of Common Sense philosophical thought. A close examination of the way Lord Hope prevented any extension of the insanity defence in the middle of the century reveals that the model of human agency on which his efforts were based closely resembles that expounded by the Common Sense philosophers John Abercrombie, whom his Lordship cited, and Thomas Reid and Dugald Stewart, by whom Abercrombie was influenced. A similar perspective is manifest in the principles underpinning the provocation defence, as set out by Hume.

In addition to this model of human agency, central features of the Common Sense perspective on rationality and epistemology are expressed in Lord Moncreiff’s development of the insanity defence in the last third of the century, and in the changing nature of the plea of diminished responsibility. Taking account of the importance of philosophical learning within the legal profession (and indeed civil society more generally) at the time these changes occurred, and the extent to which Lords Hope, Moncreiff and Deas were exposed to works of Common Sense philosophy, these conceptual parallels take on additional significance. Viewed against this backdrop, the similarities between Common Sense philosophy and the

Scottish law on mental state defences suggest that the former had a formative role in the development of the latter.

In terms of our historical understanding of this area of Scots law, the implications of this insight extend beyond the nineteenth century. The directions laid down by Lord Moncreiff were administered to juries until relatively recently, such as in *HM Advocate v Kidd* where the jury were told that they should ask themselves whether the accused was of unsound mind not by ‘inquiring into all the technical terms and ideas that the medical witnesses have put before you’ but through ‘exercise of your commonsense and knowledge of mankind...judged on the ordinary rules on which men act in daily life’.<sup>156</sup> Likewise, scepticism as to the value of medical knowledge, as pitched against common sense, continued into the twentieth century. In 1946, after a presentation by the former Commissioner of Prisons at the Annual Meeting of the Royal Medico-Psychological Association in Edinburgh Lord Cooper, the then Lord Justice Clerk, stated:

[t]he person you have to convince is the man in the jury box, who is apt to apply to such matters the yardstick of a robust and vigorous common sense, and who feels in his bones that you cannot convert a criminal into a patient by the simple expedient of describing the age-long characteristics of the typical criminal in words borrowed from ancient Greek philosophy.<sup>157</sup>

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<sup>156</sup> 1960 JC 61 at 70. The defence relieving mentally disordered people of criminal responsibility is now statutory (s51A Criminal Procedure (Scotland) Act 1995).

<sup>157</sup> W Norwood East, “The Legal Aspects of Psychiatry: Crime and Punishment” (1946) 92 (389) *Journal of Mental Science* 682 at 702. A similar attitude can be seen within the law of diminished responsibility e.g. *Carraher v HM Advocate* 1956 JC 108 where Lord Justice General Normand stated that: ‘The Court has a duty to see that trial by judge and jury according to law is not subordinated to medical theories; and in this instance much of the evidence given by the medical witnesses is, to my mind, descriptive rather of a typical criminal than of a person of the quality of one whom the law has hitherto regarded as being possessed of diminished responsibility’ (at 117).

In order to appreciate these attitudes, and the context in which they were forged, it is necessary to recognise them as more than the product of a medico-legal struggle for dominance – they embody a commitment to lay evaluation which, in the case of Scotland, has a special place in the country’s intellectual history.

These implications extend beyond Scots law, for the notion that ‘madness’ relies on lay knowledge and is ‘readable’ by non-experts continues to resonate more widely.<sup>158</sup> Locating such confidence in lay evaluation within a particular philosophical context reminds us of the importance of understanding law and legal history from a culturally informed standpoint. The currency of Common Sense philosophy in nineteenth century Scotland makes it especially germane in understanding the position of lay knowledge within Scots criminal law. Yet this association invites further consideration of the links between our understanding of criminal responsibility, and indeed other aspects of law, and the history of ideas more generally.

Finally, the connection between Scottish Common Sense philosophy and the development of mental state defences in Scotland provides an additional layer to our understanding of this philosophical movement and its import. There are numerous works on the scholarship of Reid,<sup>159</sup> some of which<sup>160</sup> are important contributions to the larger body of scholarship that is concerned with the links between law and the Scottish Enlightenment.<sup>161</sup>

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<sup>158</sup> Loughnan, *Manifest Madness* chs 3 & 6.

<sup>159</sup> E E Kroeker, “Thomas Reid Today” (2015) 13 (2) *Journal of Scottish Philosophy* 95.

<sup>160</sup> E.g. W C Davis, *Thomas Reid’s Ethics: Moral Epistemology on Legal Foundations* (2006); Blumenthal (n 7); T Roberts, “Legal Positivism and Scottish Common Sense philosophy” (2005) 18 (2) *Canadian Journal of Law and Jurisprudence* 277; D N Robinson, “James Wilson and Natural Rights Constitutionalism: The influence of the Scottish Enlightenment” <http://www.nlnrac.org/american/scottish-enlightenment>.

<sup>161</sup> E.g. J W Cairns, “Attitudes to Codification and the Scottish Science of Legislation, 1600-1830” (2007) 22 *TulEur&CivLF* 1; J W Cairns, “Ethics and the Science of Legislation: Legislators, Philosophers and Courts in Eighteenth-Century Scotland” (2000) 8 *JBR&Ethik* 159; J W Cairns “Legal Theory” in A Broadie (ed) *The Cambridge Companion to the Scottish Enlightenment* (2003) 222; J W Cairns “Adam Smith and the Role of the Courts in Securing Justice and Liberty” in R P Malloy & J Evensky (eds) *Adam Smith and the*

Nevertheless, there remains scope for further inquiry in this field, to which this article is a contribution.

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*Philosophy of Law and Economics* (1994) 31; K Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (1996); W Ewald, "James Wilson and the Scottish Enlightenment" (2010) 12 (4) *University of Pennsylvania Journal of Constitutional Law* 1053.